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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 94-0634
Controlled Substance Excise Tax
For The Period: 1994

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ISSUES

I. Controlled Substance Excise Tax—Liability

Authority: IC 6-7-3-5; IC 6-8.1-5-1(a); Bryant v. Indiana Department of State Revenue, 660 N.E.2d 290 (Ind. 1995); Clifft v. Indiana Department of State Revenue, 660 N.E.2d 310 (Ind. 1995); Hall v. Indiana Department of State Revenue, 660 N.E.2d 319 (Ind. 1995).
The taxpayer protests the assessment of controlled substance excise tax.

STATEMENT OF FACTS

Pursuant to a traffic stop on June 6, 1994 and having probable cause to search taxpayer's vehicle, Carmel police discovered and confiscated 137.4 grams of marijuana. On June 17, 1994 a jeopardy assessment was made by the Department of Revenue and served on the taxpayer on June 20. The taxpayer filed a timely protest to the assessment via counsel. Taxpayer's listed counsel was contacted to schedule a hearing. Counsel informed the Department that he no longer represented taxpayer. Several attempts were made to contact the taxpayer directly. Three separate hearings were scheduled for taxpayer to address the protest. Neither the taxpayer nor a representative of the taxpayer appeared. Further attempts were made to contact the taxpayer using the best information available, including the address listed with the Bureau of Motor Vehicles. Still, the taxpayer failed to respond. This determination is made based on the original protest filed with the Department.

I. Controlled Substance Excise Tax—Liability

DISCUSSION

In Indiana, the manufacture, possession or delivery of marijuana is taxable. IC 6-7-3-5. There were no controlled substances excise tax ("CSET") paid on the taxpayer's marijuana, so the Department assessed the tax against him and demanded payment. Indiana law specifically provides that notice of a proposed assessment is *prima facie* evidence that the Department's claim for the unpaid tax is valid. The taxpayer then bears the burden of proving that the proposed assessment is wrong. IC 6-8.1-5-1(a). Taxpayer offered no arguments or evidence to prove the assessment invalid. Any constitutional arguments are well settled.

First, the taxpayer could argue that CSET violates his Fifth and Fourteenth Amendment rights, protecting him against self-incrimination and guaranteeing due process. These arguments were addressed by the Supreme Court of Indiana in detail in Clifft v. Indiana Department of State Revenue, 660 N.E. 2d 310 (Ind. 1995). In addressing the privilege against self-incrimination, the Court concluded that "because the CSET satisfies the three prongs of the *Marchetti* test, there is no 'real and appreciable' risk of self-incrimination in violation of the Fifth Amendment. If such a risk did exist…we conclude…that the CSET provides this equivalent protection by affording taxpayers both use and derivative use immunity." Clifft at 317. In addressing procedural due process guarantees, the Court concludes that merely delaying the opportunity to be heard does not violate the Fifth Amendment. The CSET appeals processes and the opportunity to block collection efforts via injunction all "afford review in a meaningful time and in a meaningful manner which comports with the Fourteenth Amendment." Clifft at 318.

Next, the taxpayer could argue that CSET violates his Constitutional protections against double jeopardy. This argument was addressed by the Supreme Court of Indiana in detail in Bryant v. Indiana Department of State Revenue, 660 N.E. 2d 290 (Ind. 1995). The double jeopardy clause protects, among other things, a person from being put in jeopardy more than once for the same offense. The Court held that the CSET assessment is considered jeopardy under Constitutional analysis, and that the jeopardy attaches when the assessment is served on the taxpayer. Bryant at 299. Jeopardy attaches to a criminal proceeding when a jury is impaneled or when a judge signs a plea agreement. Id. Therefore, the jeopardy that attaches first is the proper jeopardy. This is further evidenced by the Court's decision in Hall v. Indiana Department of State Revenue, 660 N.E.2d 319 (Ind. 1995). In Hall, the Indiana Supreme Court ruled that CSET constituted the first jeopardy, the plea of guilty to the criminal charges the second. In that case, police entered the home of Keith Hall, finding over 300 lbs. of marijuana. Four days after the arrest, the Indiana Department of Revenue Levied a CSET assessment against Hall and his wife. After the assessment, Keith Hall pled guilty. The Indiana Supreme Court held that the CSET assessment was first in time, and that the conviction was the second jeopardy. Thus the criminal conviction, not the CSET assessment, violated the double jeopardy clause.

With respect to taxpayer's circumstances, the Department's jeopardy attached on June 17, 1994, when the assessment was made. Since taxpayer had yet to enter into a plea agreement or

impanel a jury for a trial, the CSET assessment is the first and only jeopardy to which the taxpayer can be subjected. As such, the Department's assessment does not violate the double jeopardy clause.

Since the taxpayer has not overcome the *prima facie* burden of disproving possession, and because his constitutional arguments fail, the protest is denied.

FINDING

The taxpayer's protest is denied.